should not be based on the primary meaning of the word, but is rather in the nature of the test to be applied by a court in reviewing the verdict of a jury; the point to decide is whether or not it is reasonable to consider the action of the legislature reasonable. In other words, a court can declare a statute, passed ostensibly in the interests of the police power, unconstitutional in depriving a person of life, liberty, or property without due process of law, only when it can say that it is arbitrary and capricious, or that it cannot reasonably be calculated to attain its ostensible object. *State* v. *Vandersluis*, 42 Minn. 129. See 1 Thayer's Cases on Constitutional Law, 672.

Applying this test to the statute considered in the principal case, it would seem that the decision is an unjustifiable limitation of the legislature's field of action. It is of course within the police power of the state to regulate the exercise of professions and trades which are closely connected with the public welfare, and thus to prescribe conditions upon the fulfilment of which alone a person can practice such trade or profession. *Dent* v. *West Virginia*, 129 U. S. 114. The court admits that on this basis the statute is valid so far as it deals with the compounding of medicines, but insists that to limit to registered pharmacists the right to sell patent medicines does not tend to protect the public. Yet as a pure question of fact this finding is surely open to doubt. It is well known that many of these medicines contain unwholesome and dangerous ingredients, and that a too free access to them by ignorant people is a menace to their health. A registered pharmacist is one who has satisfied a body of experts that he has the knowledge and skill requisite to the conduct of his business, and that he is a person worthy of trust. It is reasonable to suppose that such a man will be more careful to understand the properties and effects of medicines he sells, and will use greater discrimination in their sale, than would a mere travelling drummer. At any rate, it is difficult to see how any court could hold that it was unreasonable to think that such a regulation could result in promoting the public health, or that it was arbitrary and unjust. In failing to apply this test the court has failed to recognize the true extent of legislative power. Similar statutes have generally been upheld. *State* v. *Forcier*, 65 N. H. 42; *State* v. *Heinemann*, 80 Wis. 253.

RECENT CASES.

AGENCY — ATTORNEY AND CLIENT — DISCONTINUANCE OF ACTION. — The plaintiff and the defendant made a collusive agreement for the discontinuance of a suit without costs, to which the defendant's attorney objected. *Held*, that the court may require the payment of the attorney's costs as a condition of discontinuance. *National Exhibition Co.* v. *Crane*, 54 N. Y. App. Div. 175.

This decision is in accord with the established rule in dealing with such cases. *Swain* v. *Senate*, 2 B. & P. N. R. 99; *Coughlin* v. *New York, etc. R. R. Co.*, 71 N. Y. 443. It is well settled that although an attorney has a lien for his costs on a judgment that has been obtained, he has none on the cause of action itself, and, therefore, if the discontinuance is made in good faith, the attorney can look only to his client for reimbursement. *Randall* v. *Van Wagen*, 115 N. Y. 528. But here there is a dishonest agreement to deprive him of his costs, and of the possibility of acquiring a lien upon the judgment. Consequently, on the ground of unfair practice, and in order to prevent a fraud on one of its officers, the court will allow him to proceed with the action against the defendant, who has joined in the attempted fraud, and if he wins,

will give judgment to the amount of the costs. *Basquin* v. *Knickerbocker Stage Co.* 12 Abb. Pr. 324. Thus, if the discontinuance is allowed in such cases it can only be on condition of the payment of costs to the attorney.

AGENCY — DEPOSIT OF CHECK FOR COLLECTION — LIABILITY FOR NEGLIGENCE. — The defendant bank forwarded to a correspondent bank a check deposited by the plaintiff for collection. *Held*, that the home bank is not liable for the laches of its correspondent bank. *Wilson* v. *Carlinville Nat. Bank*, 58 N. E. Rep. 250 (Ill.).

The decision is in line with earlier Illinois cases. *Ætna Ins. Co.* v. *Alton City Bank*, 25 Ill. 243. The real question at issue is what contract the depositor made with the home bank, and there is a hopeless conflict of authority as to the inferences that should be drawn from the facts shown. Some courts hold that the home bank contracts to collect by means of its sub-agents, and is therefore liable for the agent's laches. *Allen* v. *Merchants' Bank*, 22 Wend. 215. As many others hold that the home bank agrees only to choose an agent for the depositor. *Dorchester Bank* v. *New England Bank*, 1 Cush. 177. In fact, however, in the vast majority of cases, the parties are merely following the usual business methods, having no clear conception of what contract they are making, and there is no reason to choose either view as expressing their intent. Accordingly the inquiry should be one of commercial expediency. The rule of the principal case, from this point of view, seems preferable, since the whole matter is settled by one suit, and business interests are on the whole better facilitated.

BANKRUPTCY — PREFERENCES — KNOWLEDGE OF DEBTOR. — An insolvent debtor, not knowing himself to be insolvent and intending no preference, made partial payments of debts in the regular course of business within four months of the commencement of bankruptcy proceedings. *Held*, that such payments are not preferences. *In re Smoke*, 104 Fed. Rep. 289 (Dist. Ct., N. Y.).

The Bankruptcy Act, § 60 a, provides that "a person shall be deemed to have given a preference, if, being insolvent, he has . . . made a transfer of any of his property, and the effect of the . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." It is well settled that a transaction of this nature will be a preference, even though the creditor acted innocently. *In re Fixon*, 102 Fed. Rep. 295; 14 HARV. LAW REV. 298. But the principal case makes a distinction when the debtor was ignorant of his insolvency, holding that this prevents the transaction from constituting a preference. The act, however, in its definition of a preference, is entirely silent as to the knowledge or innocence of either party. Thus the present construction seems an addition to the clear and unambiguous language of the statute, and is, therefore, not to be supported.

CARRIERS — GARNISHMENT. — Goods in the carrier's possession were consigned from a place within the state to a place without. *Held*, that, though the goods are still within the state, the carrier is not subject to garnishee process in a suit against the owner. *Baldwin* v. *Great Northern Ry. Co.*, 83 N. W. Rep. 986 (Minn.).

It is well settled that, under the ordinary statutes, a common carrier cannot be garnisheed, if at the time of serving process the property is out of the jurisdiction of the court. *Sutherland* v. *Second Nat. Bank*, 78 Ky. 250; *Western R. R. Co.* v. *Thornton*, 60 Ga. 300. But where this objection does not exist, a common carrier as well as any one else should be required to obey the summons. *Adams* v. *Scott*, 104 Mass. 164. There are, however, in accord with the principal case, a few decisions and numerous *dicta* which, on the ground of hardship to the carrier and inconvenience to the general public, exempt common carriers from the operation of the general language of garnishment statutes. *Stevenot* v. *Eastern Ry. Co.*, 61 Minn. 104; *Bates* v. *Chicago, etc. Ry. Co.*, 60 Wis. 296, 305. Such reasoning is unsatisfactory, especially since property in possession of a carrier is nowhere exempt from direct attachment. *Stiles* v. *Davis*, 1 Black, 101. Moreover, obedience to the garnishee process will not deprive the carrier of the profit intended to be derived from his contract with the shipper. *Rucker* v. *Donovan*, 13 Kan. 251. An opposite result in the principal case would, therefore, have been preferable.

CONFLICT OF LAWS — CORPORATIONS — NON-RESIDENT STOCKHOLDERS. — An insolvent Massachusetts corporation brought an action against stockholders resident in Nebraska, to enforce an assessment, which had been decreed by a Massachusetts

court, in a proceeding against the corporation alone. *Held*, that this decree is conclusive against the Nebraska stockholders as to the validity of the assessment. *Commonwealth, etc. Ins. Co.* v. *Hayden*, 83 N. W. Rep. 922 (Neb.).

At first sight this result might seem inconsistent with the rule, that a binding personal judgment cannot be obtained against a non-resident without service of process. *Pennoyer* v. *Neff*, 95 U. S. 714. But the validity of the assessment is clearly *res adjudicata* as to the corporation; and the true explanation of the principal case seems to be that stockholders are so closely identified in interest with and privy to the corporation, that a decree of assessment against the corporation is *res adjudicata* against them also. The rule that in an action to enforce a stockholder's statutory liability the stockholder cannot dispute a judgment against the corporation appears to rest on the same general principle. *Thayer* v. *New England Lith. Co.*, 108 Mass. 523. Furthermore, a contrary result would give rise to great practical inconvenience in winding up corporations. The principal case, therefore, reaches the desirable result, and is in accord with the weight of authority. *Hawkins* v. *Glenn*, 131 U. S. 319; *Mut. Fire Ins. Co.* v. *Phœnix Furniture Co.*, 108 Mich. 170; *Lehman* v. *Glenn*, 87 Ala. 618. *Contra*, *Lamar Ins. Co.* v. *Gulick*, 102 Ill. 41.

CONFLICT OF LAWS — DOMICILE — REVOCATION OF WILL. — A Frenchwoman made a will and subsequently married a Frenchman domiciled in England. The husband returned to France, but the wife remained in England and died there. *Held*, that the will was revoked by the marriage, and could not therefore be probated in England. *In re Martin*, [1900] P. 74. See NOTES, p. 379.

CONSTITUTIONAL LAW — BETTERMENT ACT — RETROACTIVE LAW. — In an action of ejectment, the defendant, a *bona fide* occupant, set off the value of improvements which he made upon the land prior to the passage of an act giving this right to such holders. *Held*, that the act is not unconstitutional under a state constitution prohibiting retroactive legislation. *Lay* v. *Sheppard*, 37 S. E. Rep. 132 (Ga.).

Equity early recognized the harshness of the common law rule which accorded to the *bona fide* occupant no rights whatever, and permitted him to recoup the value of his permanent improvements when he was sued for mesne profits. *Green* v. *Biddle*, 8 Wheat. 1. This, however, in many cases gave very inadequate relief, and hence in most states laws similar to the present have been enacted, and their constitutionality generally affirmed. *Ross* v. *Irving*, 14 Ill. 171. But where it has been sought to give these laws a retrospective effect, the courts have held either that such a result could not have been intended by the legislature, or in the alternative that the law was void. *Boyce* v. *Holmes*, 2 Ala. 54; *Society, etc. of the Gospel* v. *Wheeler*, 2 Gall. 104, 136. It is true cases may be found where such a law has been supported under constitutions containing no prohibition of retroactive legislation, *Albee* v. *May*, 2 Paine, 74, but this appears to be the first case so decided in the face of such a prohibition. The court reasons that, since on broad principles of justice the plaintiff is really not entitled to the improvements without paying for them, a law which takes away his undoubted legal right to have them unconditionally does not in reality invade any substantial rights. This reasoning is unconvincing, since the clear fact is that a vested legal right is taken away in direct contradiction to the terminology of the constitution.

CONSTITUTIONAL LAW — CONTEMPT — JUDICIAL POWERS. — A statute authorized certain ministerial officers to punish for contempt, the state constitution at the time empowering the legislature to establish new courts. *Held*, that as the power to punish for contempt is judicial, this statute was repealed by a new constitution vesting the judicial power of the state in certain courts thereby established. *Roberts* v. *Hackney*, 58 S. W. Rep. 810 (Ky.).

The power to punish for contempt is inherent in every court at common law, and its exercise is essentially a judicial function. Accordingly, this right in Parliament is expressly based on the judicial powers formerly exercised by that body. *Brass Crosby's Case*, 3 Wils. 188. Colonial legislatures, therefore, cannot exercise the power, *Kielley* v. *Carsons*, 4 Moore P. C. 63, and our legislatures can do so only where the right can be derived from the constitution. *Burnham* v. *Morrissey*, 14 Gray, 226; *Kilbourn* v. *Thompson*, 103 U. S. 168. Furthermore, the better view is that legislatures cannot abrogate this judicial prerogative. 13 HARV. LAW REV. 615. The principal case is therefore undoubtedly correct, since the new constitution placed the judicial powers of the state beyond the control of the legislature. The court might, however, have rested their decision upon the broader ground that the

power to punish for contempt is so inseparably connected with the exercise of general judicial powers that the legislature cannot confer it upon any body whose other proceedings are not of a judicial nature. *Whitcomb's Case*, 120 Mass. 118.

CONTRACTS — AGREEMENT NOT TO SUE — PUBLIC POLICY. — In a civil action for the pollution of a stream, amounting to a public nuisance, the defendant set up a contract by the plaintiff not to sue for such pollution. *Held*, that the contract is void as against public policy. *Western Paper Co.* v. *Comstock*, 58 N. E. Rep. 79 (Ind.).

There seems to be no direct authority on this point. A contract not to bring a civil suit is not void merely because the injury is also a crime. *Wells* v. *Thompson*, 50 Ala. 83; *Dodson & Payne* v. *McCauley*, 62 Ga. 130. So long as the prosecution of the crime is not touched upon, the parties should be allowed to settle their private claims as they see fit. The agreement in question, however, includes damage to be suffered in the future by the maintenance of the nuisance, and thus may be said to contemplate the future commission of an indictable offence. In general contracts of this latter nature might well be considered against public policy. Similarly, a contract stipulating for partial immunity from liability for future offences against a person's good name has been held void because of immorality. *Hayes* v. *Hayes*, 8 La. Ann. 468. Nevertheless, these considerations of policy seem scarcely to apply to the continuance of a public nuisance, which involves no particular immorality, and is in its nature not an ordinary crime, but a mere public tort. *Queen* v. *Stephens*, L. R. 1 Q. B. 702. An opposite decision in the principal case would, therefore, be preferable.

CONTRACTS — EXCHANGE OF LAND — BROKER'S COMMISSION. — An owner of land employed a broker to secure an exchange. The broker procured a party with whom the employer entered into a binding contract. *Held*, that although the party failed to consummate the exchange, the broker is entitled to his commission. *Roche* v. *Smith*, 58 N. E. Rep., 52 (Mass.).

This decision is in accord with what seems the universal rule in this country. *Kalley* v. *Baker*, 132 N. Y. 1; *Wray* v. *Carpenter*, 16 Colo. 261. The case is interesting, however, because of the clear statement by the court of the principles involved. The broker has not fulfilled his contract, since no exchange was secured; but as the principal has accepted the customer by entering into a binding contract with him, the broker is held to be excused thereby from further duty. The broker must of course act in good faith, or he cannot recover. *Burnham* v. *Upton*, 174 Mass. 408. If the employer refuses to contract until he examines the title, which proves defective, or if he makes a contract, to be determined if the title is not good, in the opinion of the court, he should not be liable to the broker. But, by entering into a binding contract, he either secures the land or a right of action on the contract to compensate him for his loss through its breach, and he should therefore pay for the services which obtained him these rights.

CONTRACTS — ILLEGAL CONTRACTS — COLLATERALLY AIDING AN IMMORAL PURPOSE. — The plaintiffs bailed furniture knowing it was to be used in a house of ill-fame, the agreement providing for a future sale unless the plaintiffs previously reclaimed. *Held*, that the contract is void as against public policy. *Standard Furniture Co.* v. *Van Alstine*, 62 Pac. Rep. 145 (Wash.). See NOTES, p. 381.

CONTRACTS — STATUTE OF LIMITATIONS — SUNDAY LAW. — The defendant being indebted to the plaintiff, one X, by consent of the plaintiff, agreed with the defendant on Sunday that the defendant should do certain work for X, and that X should pay the compensation to the plaintiff on the defendant's account. This agreement was afterward completely carried out on a week day. A statute forbade the doing of business on Sunday. *Held*, that since the agreement made on Sunday is void, X had no valid authority to pay the money to the plaintiff, and the payment therefore does not interrupt the running of the Statute of Limitations against the original debt. *Pillen* v. *Erickson*, 83 N. W. Rep. 1023 (Mich.).

The court argues correctly that the defendant was never bound to permit payment to the plaintiff of the money which became due from X. But this does not conclude the question whether there was in fact a valid part payment on the old debt, which would of course interrupt the running of the statute. *Wesner* v. *Stein*, 97 Pa. St. 322. It is hard to see why the Sunday transaction, though creating no obligation whatever, did not amount to an authority to pay the money to the plaintiff. A bare authority whenever given would of course be revocable, but it was not revoked here. To deprive

a payment actually made in pursuance of such an authority of its ordinary legal significance, because the authority was given on Sunday, is to give to the Sunday statute an unusually sweeping interpretation. There seems to be no case exactly in point, but in several cases analogous transactions on Sunday, not amounting to contracts, have been given full legal effect. *Tuckerman* v. *Hinkley*, 9 Allen, 452; *Beardsley* v. *Hall*, 36 Conn. 270; *Riley* v. *Butler*, 36 Ind. 51. The principal case seems, therefore, to be incorrect.

CRIMINAL LAW — FORGERY — CHARACTER OF INSTRUMENT. — By an *ultra vires* resolution of a board of county commissioners, a bounty was offered for the killing of gophers, and the certificate of the township clerk as to the number killed was made the basis on which the auditor's warrant was to be issued, *Held*, that such certificate is not the subject of forgery. *State* v. *Ryan*, 83 N. W. Rep. 865 (N. D.).

The principal case limits the scope of the crime of forgery considerably. It is true the court does not go so far as to say that no instrument can be the subject of forgery where its invalidity, even if it is genuine, depends on a question of law, but relies on the point that in the present case there was clearly no legal enforceable liability on the county, since it is well settled that counties have no such power as was here attempted to be exercised. Assuming that this is as well settled as is claimed, is the tendency of the forged instrument to deceive the county officers thereby diminished? Is it fair to suppose that a county which has agreed to rely on township clerks' certificates will not be deceived by the false making of such certificates? The soundness of the case may, therefore, well be doubted, and some authority has been found which tends to support an opposite conclusion. *People* v. *Munroe*, 100 Cal. 664; *State* v. *Eades*, 68 Mo. 150.

DAMAGES — DETENTION OF PERSONAL PROPERTY — MITIGATION OF SPECIAL DAMAGES. — In an action for detention of corn plaintiff claimed as special damages the loss of a sale at the highest market value during the period of detention. *Held*, that it was error to exclude defendant's evidence that within thirty days after the corn was returned, while the plaintiff still held it, and before the action was commenced, its market value was as high and its sale as feasible as during the detention. *Hoyt* v. *Fuller*, 104 Fed. Rep. 192 (C. C. A., Eighth Cir.).

This precise question seems not to have arisen before. In an action for unlawful detention the measure of damages is ordinarily the value of the use of the property while detained. *Cook* v. *Hamilton*, 67 Iowa, 394. But where, as in the principal case, the property is of such a character that the value of its use amounts to nothing, this measure cannot be adhered to. *Lumber Co.* v. *Spencer*, 81 Iowa, 549. Hence the plaintiff claimed the benefit of the rule adopted in some jurisdictions in actions of trover, that, where the property converted is subject to fluctuations in value, the measure of damages is the highest market value of the property within a reasonable time after conversion. *Galigher* v. *Jones*, 129 U. S. 193. If this rule is to be supported at all, it must be on the ground that it is an application of the basic principle that actual compensation is the true measure of damages in all cases. But it is obvious that where the defendant's evidence shows that the plaintiff did not in fact suffer the damage claimed, the reason for applying the rule falls. Hence the principal case, in admitting evidence to this effect, reaches a sound conclusion.

EQUITY — SEALED INSTRUMENTS — CONSIDERATION. — *Held*, that in a bill in equity to enforce a sealed instrument it is not necessary to allege a consideration, but that it is for the defendant to show want of consideration. *Mills* v. *Larrance*, 58 N. E. Rep. 219 (Ill.).

This decision applies in equity what is said by the court to be the common law rule, that a seal is presumptive evidence of consideration. The Wisconsin case relied upon for that rule is based upon a statute and does not represent the common law. *Carey* v. *Dyer*, 97 Wis. 554; WIS., REV. ST. § 4195. Aside from statute, a seal is said to import a consideration. This, however, means simply that a sealed instrument requires no consideration, as is shown by the fact that a sealed promise is enforceable, even though gratuitous. *Bunn* v. *Guy*, 4 East, 190, 200; *Ducker* v. *Whitson*, 112 N. C. 114. But it is well settled that equity will not grant specific performance of a sealed instrument unless there be an actual consideration for it. *Tatham* v. *Vernon*, 29 Beav. 604. Consequently it seems clear on principle that it is for the plaintiff in equity to allege and prove consideration in cases where the bill is founded upon a sealed as well as upon an unsealed instrument, for otherwise his bill does not show such facts as entitle him to relief.

EQUITY — SPECIFIC PERFORMANCE — STATUTE OF FRAUDS. — The plaintiff agreed to give the defendant a mortgage on certain land in consideration of the latter's oral promise to give him a release of another mortgage and to pay him a sum of money. The plaintiff gave defendant the mortgage, and received the money, and now brings a bill for specific performance of the promise to release. *Held*, that he has so changed his position as to take the case out of the Statute of Frauds, and that specific performance should be granted. *Gross* v. *Milligan*, 58 N. E. Rep. 471 (Mass.).

The rule is well established that, where there has been such part performance of a contract that it would be a fraud on the plaintiff if it is not completed, specific performance will be granted notwithstanding the defence of the Statute of Frauds. *Potter* v. *Jacobs*, 111 Mass. 32; *Parkhurst* v. *Van Cortland*, 14 Johns. 15. If the plaintiff has no other remedy but an action at law, this rule is clearly applicable, *Walker* v. *Walker*, 2 Atk. 98, 100 (*semble*), and it seems to have been assumed in such cases that the only alternative, namely, an order that what had been done should be undone, could not be given, even though it would have restored the plaintiff to his original position. *Tilton* v. *Tilton*, 9 N. H. 385 (*semble*). In the present case the parties might have been put *in statu quo* by the cancellation of the deed, and the return of the money received. This relief would be analogous to the cancellation of a deed obtained by fraud, *Thompson* v. *Graham*, 1 Paige, 283, and would be preferable to that given here, since it would not be in conflict with the provisions of the statute. Apparently, however, such a course has never been followed.

JURISDICTION — ELECTIONS — PARTY NOMINATIONS. — A regularly called county convention of a party made nominations for county offices. Later, its delegates to a state convention joined a bolt, whereupon the state convention recognized and admitted a rival delegation and authorized it to call another county convention, which met and made new nominations. *Held*, that the nominees of the first convention must go on the ballot as the regular candidates of the party. *State ex rel. Kennedy* v. *Martin*, 62 Pac. Rep. 588 (Mont.).

Political parties are now recognized by law and exercise important public functions, but the courts have been timid in subjecting them to legal control. Thus, where two persons claim the nomination by a local convention the courts accept the decision of the state authorities of the party. *Moody* v. *Trimble*, 58 S. W. Rep. 504 (Ky.). Likewise, where two district conventions claim to represent the party, the decision of the state convention has been held conclusive, though opposed to a previous adjudication of the courts. *In re Woodworth*, 16 N. Y. Supp. 147; *In re Pollard*, 25 N. Y. Supp. 385. Apparently it would follow naturally from these cases that the decision of the national party authorities between rival state conventions would be binding, but it is doubtful if any court would go so far. Indeed, in one case recognition by the national authorities seems to have been ignored, the court, however, resting its decision on other grounds. *Phelps* v. *Piper*, 67 N. W. Rep. 735 (Neb.). Furthermore, a nomination by delegates not representing the whole district has been held irregular. *State* v. *Weir*, 31 Pac. Rep. 417 (Wash.). Yet, it is hard to see why this is any more objectionable than the control of such nominations by delegates from outside the district. Moreover, it has been held that, at least in the absence of a decision by the state party authorities, the courts will decide what organization represents the party in a particular place. *In re Supervisors of Election*, 9 Fed. Rep. 14. Although there are strong practical reasons why the courts should refrain from dealing with purely political questions where possible, a fair interpretation of the ordinary statutes seems to impose upon them the responsibility of deciding on this whole class of cases. The principal case, therefore, together with the few other cases quoted, where the courts have shown a similar tendency, is to be commended.

PERSONS — MORTGAGE BY INFANT — AVOIDANCE. — The plaintiff, while an infant, purchased land, and on the next day mortgaged it to the defendant to secure money advanced by him for the purchase price. Subsequently the latter took possession of the premises for breach of a condition in the mortgage deed. On attaining majority, the plaintiff sought to avoid the mortgage and obtain possession of the premises. *Held*, that as the purchase and the advance were one and the same transaction, the plaintiff cannot repudiate one part and affirm the other. *Thurston* v. *Nottingham, etc. Society*, 17 Times L. R. 7 (Ch. D.).

Where an infant purchases land and gives his grantor a mortgage back to secure the price, the two conveyances are treated as one contract; and hence the infant cannot affirm or avoid one conveyance without affirming or avoiding the other. *Hubbard*

v. *Cummings*, 1 Me. 89. The principal case applies the same doctrine where the infant's grantor and the mortgagee were, apparently, different persons. By making the infant's right to avoid the mortgage conditional upon his avoidance of the original conveyance all parties are put *in statu quo*. For the infant may recover the consideration he gave for the original conveyance, *McCarthy* v. *Henderson*, 138 Mass. 310, and as this consideration represents the mortgagee's advance, the infant, in seeking the aid of equity, must do equity by restoring the mortgagee to his original position. *Hillyer* v. *Bennett*, 3 Edw. Ch. 222. The decision in this last case, as well as that of the principal case, if not absolutely inconsistent with, at least is an exception to the rule which limits the adult's recovery to such part of the consideration only as the infant retains in specie. *Miller* v. *Smith*, 26 Minn. 248. The result is, however, obviously just, and is supported by some authority in this country. *Dana* v. *Combs*, 6 Me. 89.

PERSONS — TRESPASS — POSSESSION BY WIFE. — During the temporary absence of the plaintiff's husband, the defendant committed a trespass in the husband's house. *Held*, that the plaintiff had sufficient possession to maintain an action of trespass. *Ford* v. *Schliessman*, 83 N. W. Rep. 761 (Wis.).

At common law actual possession by the wife constituted legal possession by the husband. *Bell* v. *Bell*, 37 Ala. 536. Since, therefore, the wife had no legal possession, she was unable to bring an action of trespass. Cf. *Lamb* v. *Swain*, 3 Jones, N. C. 370. The principal case is thus clearly a departure from strict principle. The court mentions no statute as a basis of its decision. The explanation, however, may perhaps be found in the changed position of married women under modern legislation. They are now treated in general so nearly on an equality with men in the rights given them that, even in the absence of a statute on the exact point, a court might feel justified in holding that a married woman to-day is capable of legal possession. Likewise a natural desire of the judges not to turn out of court, on a technical point of procedure, a plaintiff who had a good cause of action may well have affected the decision. At all events, the result seems eminently just, and in accord with the present policy of the law.

PROPERTY — CONSTRUCTIVE POSSESSION — TRESPASS. — The plaintiff was in actual occupation of a portion of a lot of land under a deed of the whole. The defendant committed a trespass upon a part not actually occupied by the plaintiff. At the trial the plaintiff failed to prove a good title. *Held*, that the plaintiff had not such possession as would sustain an action of trespass. *Ault* v. *Meager*, 37 S. E. Rep. 186 (Ga.).

This decision places a novel limitation upon the doctrine of constructive possession. Where partial possession has been taken under a valid deed it is everywhere agreed that there is constructive possession of the whole in no way differing from actual possession. Litt. § 417, 418. *Gardner* v. *Gooch*, 48 Me. 487. In America this principle has been extended so that partial possession under mere color of title for the statutory period confers a good title to the whole. *Coleman* v. *Billings*, 89 Ill. 183; *Jackson d. Hasbrouck* v. *Vermilyea*, 6 Cowen, 677. Whether such possession for a less period is also sufficient to support an action of trespass appears never before to have been decided. A strong *dictum*, however, has been found contrary to the decision of the principal case. *Ralph* v. *Bayley*, 11 Vt. 521. On principle there appears to be no reason for a different result in the two cases. The reasons of public policy which justify the American doctrine in the one case apply equally in the other. Moreover, the present decision reaches this absurd result, that while the occupant has possession against the true owner, he has no possession at all against the mere trespasser.

PROPERTY — LITTORAL LAND — RIGHT TO ACCRETION. — Plaintiff was the owner of littoral land which the ocean gradually washed away until the high water mark reached the defendant's land. Then the ocean gradually receded leaving a strip of alluvial land. *Held*, that all accretions beyond the defendant's original line go to the plaintiff. *Ocean City Assoc.* v. *Shriver*, 46 Atl. Rep. 690 (N. J., C. A.). See NOTES, p. 376.

PROPERTY — STATUTE OF LIMITATIONS — TITLE TO LAND. — One X occupied certain land by permission of the owner, paying no rent, and remained in possession for twenty years after the land had been conveyed to a stranger, without knowledge of the conveyance and claiming to hold under the permission originally given. *Held*, that the Statute of Limitations did not run in his favor. *Bond* v. *O'Gara*, 58 N. E. Rep. 275 (Mass.). See NOTES, p. 374.

PROPERTY — SURFACE WATERS — INCREASED FLOW UPON ADJACENT LAND. — Defendant constructed a system of drainage entirely upon his own land, as a result of which the flow of surface water upon plaintiff's land was increased. *Held*, that the plaintiff has no cause of action. *Connell* v. *Stark*, 83 N. W. Rep. 1092 (Wis.).

In some jurisdictions the civil law rule prevails, that the lower owner is bound to receive the natural flow of surface water. *Martin* v. *Riddle*, 26 Pa. St. 415. Under such conditions, an increase of flow creates a greater burden and should give a right of action. *Miller* v. *Laubach*, 47 Pa. St. 154. But in most states the common law rule is adopted which allows the lower owner to prevent the influx of surface water upon his land by erecting structures at the upper extremity. *Walker* v. *Southern Pacific R. R. Co.*, 165 U. S. 593, 602; 11 HARV. LAW REV. 65. In these jurisdictions, the lower owner is ordinarily amply protected by this right against all damage from surface water, and he is usually allowed no right of action. *Gannon* v. *Hargadon*, 10 Allen, 106; *Goodale* v. *Tuttle*, 29 N. Y. 459, 467. *Contra*, *Adams* v. *Walker*, 34 Conn. 466. As the law of surface waters is so largely arbitrary and free from decisive principles, the chief aim in dealing with it should be to secure uniformity, and the decision in the principal case is, therefore, to be supported.

PROPERTY — WILLS — REVOCATORY CLAUSE INSERTED BY MISTAKE. — A testator inserted a revoking clause into a will disposing of some property left undisposed of by an earlier will. This clause was introduced under a mistaken impression as to its effect and did not represent the testator's wishes. *Held*, that both documents should be probated and the words of revocation omitted. *Marklem* v. *Turner*, 17 Times L. R. 10 (P. D.).

There being no jurisdiction for the reformation of wills, the form of the will, as it stands at the time of execution, is on principle conclusive. *Stanley* v. *Stanley*, 2 J. & H. 491. The English probate courts, while admitting that inadvertent omissions cannot be remedied, have in some cases allowed parts of a will which were mistakenly introduced without the testator's knowledge to be struck out on probate. *Goods of Oswald*, L. R. 3 P. & D. 162; *Morrell* v. *Morrell*, 7 P. D. 68. The power to do this has, however, been expressly denied in cases where the contents of the will were brought to the notice of the testator at the time of execution. *Guardhouse* v. *Blackburn*, L. R. 1 P. & D. 109. The principal case, therefore, where the testator necessarily knew of the revocatory clause, since he inserted it himself, goes far in the wrong direction and is opposed to an earlier English case. *Collins* v. *Elstone*, [1893] P. 1. In accord, however, see *In re Purdy's Will*, 20 N. Y. Supp. 307. Such mistakes must be remedied, if at all, in construing the instrument, but it would have been difficult even in that way to override the express revocatory clause in the present case.

SALES — WAIVER OF DEFECTS. — The plaintiff ordered from the defendant wheat of a certain description, and, before it arrived, paid for it, receiving the bill of lading. *Held*, that the plaintiff has not waived his right to recover damages for the failure of the wheat to answer the description in the contract. *Munford* v. *Kevil*, 58 S. W. Rep. 703 (Ky.).

It has also been held in Kentucky that an acceptance of defective goods was a waiver of any right of action for defects, on the ground that it is an agreement that the quality is satisfactory. *Jones* v. *McEwan*, 91 Ky. 373. When the defects are obvious there is considerable authority elsewhere to the same effect. *Gaylord* v. *Allen*, 53 N. Y. 515. The better view, however, would seem to be that such an acceptance is really nothing more than a waiver of the buyer's right to reject the goods, and not of his right to sue for damages. *Underwood* v. *Wolf*, 131 Ill. 425; *Morse* v. *Moore*, 83 Me. 473. The principal case, therefore, is correctly decided according to the preferable rule. It is not, however, inconsistent with the extreme view that acceptance is to be interpreted as an agreement as to quality, since this cannot possibly be true where there has been no opportunity for inspection.

SALES — WAREHOUSE RECEIPTS — RIGHTS OF A SECOND PLEDGEE. — The defendant, owner of goods stored in a warehouse, pledged them to one X, giving him a non-negotiable warehouse receipt running to him. X in turn pledged them for a larger sum to the plaintiff, who was ignorant of the previous transaction, giving him a similar receipt. *Held*, that the plaintiff's rights against the owner are limited by the amount of the first pledge. *Commercial Nat. Bank* v. *Bemis*, 58 N. E. Rep. 476 (Mass.). See NOTES, p. 380.

SURETYSHIP — STATUTE OF FRAUDS — CONSIDERATION. — The defendant's husband died, owing the plaintiff for goods purchased, and after his death, the defendant, without obtaining a transfer of the property, assumed control of the business. The plaintiff then agreed to leave the goods with her and to continue to sell to her on credit in consideration of her oral promise to assume her husband's indebtedness. *Held*, that this agreement is unenforceable within the Statute of Frauds. *Cardeza* v. *Bishop*, 54 N. Y. App. Div. 116.

According to the preponderance of authority, an oral promise to pay the debt of another, when founded upon a new consideration moving to the promisor and beneficial to him, is not within the Statute of Frauds. *Mallory* v. *Gillett*, 21 N. Y. 412. On principle, however, this position is objectionable in that it reads into the statute an exception not actually enacted. *Allen* v. *Thompson*, 10 N. H. 32. This being true, the rule in question should be applied strictly, and in order to invoke its aid, the consideration should be of actual benefit to the promisor. Here the possibility of such benefit is too remote. If it had appeared that there were no other claimants against the estate and that the promisor would ultimately be entitled to the goods, the result might be different. But the case as made out by the plaintiff is no more than a promise to a creditor to pay the debt of another, in consideration of mere forbearance by the creditor. Such a promise is universally held to be within the Statute of Frauds. *White* v. *Rintoul*, 108 N. Y. 222. The decision in the principal case, therefore, is clearly sound.

TORTS — LEGAL CAUSE — INSTINCTIVE ACT. — The plaintiff, while employed in the defendant's shop, was injured by stepping into a barrel of hot water sunk in the ground, and he claimed that the accident was caused by the conduct of the defendant's vicious dog. The jury was instructed to find for the plaintiff if the acts of the dog were of a character to induce in a reasonable man such alarm as would cause him to forget the presence of the barrel and involuntarily step into it. *Held*, that the charge was erroneous, and the plaintiff can recover only if he proves that the defendant was negligent in placing and maintaining the barrel. *Meyer* v. *Boepple Button Co.*, 83 N. W. Rep. 809 (Iowa).

It is difficult to understand the view taken by the higher court. The need of proving *scienter* having been removed by statute, the plaintiff should be entitled to recover if acts of the dog in the nature of an attack, and not provoked by any fault of the plaintiff, constituted the legal cause of the damage. *Dennison* v. *Lincoln*, 131 Mass. 236. It is, moreover, clear that the causal connection is not broken by an instinctive act of the plaintiff, caused by an alarming situation for which the defendant is responsible, at least where the situation is such that the average man would be likely so to act. *Gannon* v. *New York, etc. R. R. Co.*, 173 Mass. 40; *Coulter* v. *American, etc. Co.*, 56 N. Y. 585. In this view of the case, which seems to have been that of the trial court, the defendant's negligence in regard to the barrel would be wholly immaterial. The decision holding such negligence essential appears, therefore, incorrect.

TORTS — LEGAL CAUSE — PROBABLE CONSEQUENCE. — The defendant's engine, through the negligence of the engineer, struck a person at a crossing and hurled his body against the plaintiff, who was standing on the platform of defendant's station near by. *Held*, that the defendant's negligence is not the legal cause of the injury. *Evansville, etc. R. R. Co.* v. *Welch*, 58 N. E. Rep. 88 (Ind.). See NOTES, p. 377.

TORTS — PROPERTY — NUISANCE. — *Held*, that an owner of land is entitled to build stables thereon in the manner best suited to his business, and such stables, if conducted in a reasonably proper manner, do not constitute a nuisance for which damages may be recovered by adjoining property owners. *Harvey* v. *Consumers' Ice Co.*, 58 S. W. Rep. 316 (Tenn., Sup. Ct.).

This decision is based by the court upon a rule of equity that a stable is not *prima facie* such a nuisance as will warrant an injunction against its erection. *Kirkman* v. *Handy*, 11 Humph. 406; *St. James Church* v. *Arrington*, 36 Ala. 546. See *contra*, *Coker* v. *Birge*, 9 Ga. 425; *Aldrich* v. *Howard*, 7 R. I. 87. But whether an injunction will issue to prevent such a possible future tort or not, in determining the present existence of a nuisance, the court should not merely consider whether, from the defendant's point of view, the use of his property is suitable and reasonably proper for the carrying on of his business, but should also look at the effects upon neighboring property, and decide whether the place is a proper location for such a business. The decision in the principal case, therefore, is wrong in theory, and it is unsupported by authority. *Dargan* v. *Waddill*, 9 Ired. 244; *Burditt* v. *Svenson*, 17 Tex. 489.

TRUSTS — INSURANCE — MURDER OF INSURED BY BENEFICIARY. — The beneficiary in a benefit certificate of insurance murdered the insured. The administrator of the insured sued on the policy. An assignee of the beneficiary intervened. *Held*, that since the company was a trustee of the money payable on the certificate for the beneficiary her crime barred all actions by her or her assignee and a resulting trust for the administrators of the insured arose. *Schmidt* v. *Northern Life Assoc.*, 83 N. W. Rep. 800 (Iowa). See NOTES, p. 375.

TRUSTS — INVESTMENTS BY TRUSTEES — LIABILITY FOR LOSS. — A testator, in creating a trust, directed his trustees to invest the funds in any securities which they might deem beneficial to his estate. They invested in the stock of a corporation organized to engage in manufacturing, but having no plant and no established business. *Held*, that this is beyond the scope of their authority, and they are therefore liable for the loss resulting. *In re Hall*, 58 N. E. Rep. 11 (N. Y.).

In England, in the absence of directions by the testator, trustees are allowed to invest only in government securities or in first mortgages on real estate. *Hancom* v. *Allen*, 2 Dick. 498; *Clough* v. *Bond*, 3 Myl. & C. 490, 496. This rule has been adopted in some of our states. *King* v. *Talbot*, 40 N. Y. 76; *Hemphill's Appeal*, 18 Pa. St. 303. In others, however, no particular investments are prescribed, but the trustee must act faithfully and with sound discretion. *Harvard College* v. *Amory*, 9 Pick. 446; *Mattocks* v. *Moulton*, 84 Me. 545. Even where the trustees, as in the principal case, are given by the terms of the will unlimited choice in their investments, they should still use a sound discretion. *Clark* v. *Garfield*, 8 Allen, 427. Such discretion is that which prudent men would exercise in the management of their own affairs, not with reference to speculation, but with a view to the permanent disposition of funds. *Harvard College* v. *Amory*, *supra*; *Kimball* v. *Reding*, 31 N. H. 352. The investment in the principal case is clearly speculative in nature, and the decision is therefore unquestionably correct.

REVIEWS.

AMERICAN LAW. A Treatise on the Jurisprudence, Constitution, and Laws of the United States. By James Dewitt Andrews. Chicago: Callaghan & Co. 1900. pp. cxii, 1245.

There are, it is conceived, three possible varieties of treatise on the *corpus juris* of America. Historically the method and purpose of Blackstone and Kent take precedence. They purported to place within a single work an authoritative statement of the law in all its parts. Both these authors pursued the method followed by Glanvil, Bracton, Coke, and Hale, and assumed that the only serviceable works on the laws of England were those which treated the whole of its jurisprudence. In adopting this system they all took as a model Justinian's Institutes and Code. What may be denominated the second class of works on the whole body of the common law is that to which the volumes by Walker and by Russell belong. They are hardly more than a course of lectures thrown into the form of a text-book. The third sort of treatise is best exemplified by Savigny's Geschichte des Heutigen Römischen Rechts. Such a work aims to show the history and genesis of the law in all its parts, and is characterized by a close historical analysis of the relation existing between those various subdivisions. As the law stands in America, the first class of treatise has passed away in deference to the works on special topics. The second is useful only to the student of the elements of the law. Of the three varieties the last is the only one which can be of any service to us, and it ought not to be attempted until the various por-